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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~324~~ 66

THE NEW YORK AND WILMINGTON STEAMSHIP COMPANY
APPELLANT,

vs.

WILLIAM H. MOUNT, ADAM PARTRIDGE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1877.

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 At a stated term of the district court of the United States of America, for the eastern district of New York, held at the United States court rooms, in the city of Brooklyn, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

Present: The Hon. Chas. L. Benedict, district judge.

In the matter of the petition of The New York and Wilmington Steamship Company, owners of the steamship Benefactor, &c.

The petitioner above named appears and files the petition in the above entitled matter, in the words and figures following, to wit:

To the honorable Charles L. Benedict, judge of the *supreme* court of the United States, within and for the eastern district of New York:

The petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, her engines, &c., respectfully shows:

2 First. That your petitioner is a corporation created by and existing under the laws of the State of New York, and is and was, at the times hereinafter mentioned, sole owner of the steamship Benefactor, her engines, &c.

Second. That on the morning of the 26th day of February, 1875, a collision occurred between the steamship Benefactor and the schooner Susan Wright, whereby the said schooner was sunk, and, together with a large cargo of valuable merchandise, and the ship stores and personal effects of the officers and crew, became and was a total loss.

Third. That said collision happened, and the loss, damage, injury, and destruction above referred to, was done, occasioned and occurred without the privity or knowledge of your petitioner.

Fourth. That on or about the 4th day of March, 1875, the owners of said schooner filed their libel in this court against said steamship Benefactor to recover the damages sustained by them as owners of said schooner, and as common carriers of the cargo laden on board thereof; and on the same day the seamen on board said schooner, at the time of the collision, also filed their libel against said steamship to recover the damages by them sustained for loss of personal effects; that thereafter the owners of the cargo laden on board said schooner duly intervened as colibellants in the suit commenced by the owners of said schooner.

Fifth. That thereafter, by order of this court, said steamship was duly appraised and her value was, by such appraisement, fixed at the sum of forty thousand dollars; and it appearing to the court that the New York and Wilmington Steamship Company, claimant of said steamship Benefactor, her engines, tackle, &c., upon the seizure

3 of the said steamship, her engines, tackle, &c., upon process issued pursuant to the prayer of the libel filed in this cause on the 4th day of March, 1875, by Wm. H. Mount and others, libellants, and upon process issued, pursuant to the prayer of another libel, filed by Wm. Hirst and others, on the same fourth day of March, 1875, in the same court, the district court of the United States for the eastern district of New York, appeared as owner, and obtained an order, made and entered in each of the said causes, on the twentieth day of March, 1875, whereby it was ordered that The New York and Wilmington Steamship Company have leave to give a stipulation, with sufficient sureties in the appraised value of said steamship, and that such stipu-

lation should be for the benefit of the libellants in both of said suits against said steamship (in case they should establish the liability of said steamship), and of all persons and parties who might, by due proceedings in this court, show themselves entitled to liens upon said steamship, by reason of the collision in the libels mentioned, and that upon the entering into and filing such stipulation, the said steamship, her engine, &c., should be discharged from all liability for losses and damages occasioned to all the parties for whose benefit said stipulation should be given; as by reference to said order will more fully appear; and that in pursuance of the said last-mentioned order the claimant did, on the 22d day of March, 1875, enter into and file a stipulation, with sufficient sureties, in the appraised value of said steamship, to wit, the sum of forty thousand dollars, with interest, to stand in place of said steamship, her engine, &c., whereupon said steamship, her engine, tackle, &c., was discharged from all such losses and damages as aforesaid. That the value of the freight pending at the time of said loss, damage, injury, and destruction, was the sum of twelve hundred and twenty $\frac{32}{100}$ dollars.

4 Sixth. That your petitioner has filed answers to each of said libels against said steamship, denying all liability on its part by reason of the collision.

That your petitioner claims that your petitioner, as the owner of said steamship, as well as said steamship, are exempt from liability for any loss, destruction, damage, or injury arising from said collision, by reason of the facts and circumstances alleged in the answers filed by this petitioner as claimant of the said steamship to said libels; to which this petitioner refers for their contents, and which facts and circumstances are substantially as follows:

In respect to the collision, your petitioner avers, upon information and belief, that a collision did occur between the schooner Susan Wright and the steamship Benefactor, after ten o'clock on the morning of the twenty-sixth day of February, 1875, in the vicinity of what is commonly known as the Woodlands, on the coast of New Jersey. That the schooner was bound to the port of New York, the weather was fair, the wind from west to west-northwest or thereabouts. That the schooner had her five lower sails set, except the bonnet on the jib, and was sailing at the rate of from seven to eight knots an hour. That she was heading by compass (before the change in her course, as hereafter stated) from north to north by west or thereabouts. That she had no lookout. That she had a licensed pilot, who was in charge of her navigation. That the pilot and one man were at the wheel and the captain was standing around near by. That the mate was engaged forward in overhauling the starboard chain, one man was below helping him, and the other sailors were in the forecastle. The pilot, upon stooping down and looking under the mizzen booms, first saw the steamship coming down the coast, being then about half a mile distant and bearing a little on the schooner's starboard bow. That the pilot then ordered the

5 schooner's wheel to be ported, so as to pass the steamship port to port, and he assisted the man at the wheel in pulling the wheel to port. That by this movement the schooner's head fell off several points to the eastward, thereby bringing the steamer on her port bow, and if she had kept that course or steadied *or* wheel, she would have passed the steamship with port to port, as the pilot had intended, at a proper and safe distance apart, without the least danger of a collision. But instead of doing so, the master of the schooner, when somewhere within a quarter of a mile of the steamship, wrongfully and

improperly took the navigation of the schooner out of the charge of the pilot, and, thrusting him away, seized the wheel and instantly hove it hard to starboard, and thereby brought the schooner's head to the wind and athwart the steamship's course, and under her bows. That the schooner came up so far to the wind before the collision that her sails shook, and that while in that position the steamship unavoidable struck the schooner on her starboard quarter, somewhere about ten feet abaft the mizzen chains, and sunk her.

That the steamship, being of the burden of about 900 tons, left her dock at New York at about six o'clock of the morning of the said 26th day of February, 1875, being in all respects seaworthy, tight, staunch, strong, well-fitted, officered, manned, and equipped, with a cargo consisting of general merchandise, bound on one of her regular trips to Wilmington, North Carolina.

That the said steamship proceeded along in safety, and without any accident, and while running along down the coast, under steam, and having all sails set, heading by compass somewhere from about south by west to south-southwest, and having a competent lookout properly stationed forward and faithfully attending to his duty, the
6 schooner was discovered approaching, being then about two miles distant, and bearing from one to two points on the port bow; that there was at that time plenty of room for the steamship to have kept out of her way, and if the schooner had kept her course the steamship could and would have done so, and have passed her at a proper distance, with port to port, and in perfect safety; that as the schooner approached she was carefully watched by those navigating and having charge of the steamship, and when the schooner was about half a mile distant it was observed that she appeared to be keeping off, being, as was supposed, on a port helm; that thereupon the wheel of the steamship was ported, and her head came up, so that she headed somewhere about southwest; that if both vessels had then kept their respective courses, which each had then taken, they would have passed each other with port to port at a safe and proper distance, and without the least danger of a collision; but the schooner did not keep the course she had thus elected to take; on the contrary, when she had approached within about a quarter of a mile from the steamship, she suddenly and unexpectedly to those navigating the steamship luffed up to the wind, and before the collision she had come up so far that her sails shook, thus bringing her starboard side towards the steamship; that as soon as it was discovered that the schooner was so luffing, the wheel of the steamship was put hard to starboard as quickly as possible, the bells were rung to stop and back, the main sheet let go, and every effort made as quickly as possible which could have been to avoid a collision, but it was impossible to keep away from or to clear the schooner as she then was, and the steamship struck her, as already stated, on her starboard side about ten feet abaft the mizzen chains and sunk her.

Your petitioner further shows that each of said causes was tried in this court as to the question of fault for said collision on the
7 twenty-first day of April, 1876, and thereafter , interlocutory decrees by said court adjudging that said steamship was the party in fault for said collision, the damages sustained by the libellants were assessed, and reports made dated the 28th and 30th August, 1876, showing, as reported, damages from said collision, in the aggregate, amounting to sixty one thousand eight hundred and ten dollars and forty-nine cents ($61,810.49.)

And thereafter, after consolidation of suits by order of the court, a

decree was made and entered by said court on the twenty-first day of October, 1876, of which annexed is a copy, which said decree of said district court is not final, being still subject to appeal therefrom to the U. S. circuit court.

Seventh. That your petitioner desires as well to contest its liability as well as that of said steamship Benefactor for the alleged loss, damage, destruction, and injury occasioned by said collision in the proceedings upon this petition, and also to claim the benefit of limitation of liability provided for by section 4283 of the Revised Statutes of the United States, and is ready and willing, and hereby offers to give a stipulation with sureties in the value of said steamship and freight pending at the time of such alleged loss, damage, destruction, and injury for the payment thereof into court whenever the same shall be ordered.

And your petitioner, for the purpose of facilitating the proceedings herein, is ready and willing, and hereby offers to admit in evidence, in the proper stage of the proceedings to be had on this petition, the depositions and other proofs taken in said suits against said steamship referred to.

Eighth. That your petitioner further shows, that as appears from the reports of assessments of damages as aforesaid in said suits
8 against said steamship Benefactor, and said decree affirming the same, the amount of the loss, damage, and injury sustained by the owners of said schooner, cargo, and personal effects will greatly exceed the value of said steamship and freight pending, which value and freight pending will not be sufficient to make compensation for the loss aforesaid.

Wherefore your petitioner prays that this honorable court will order and direct that your petitioner be permitted to give a stipulation in the sum of forty-one thousand two hundred and twenty dollars and thirty-two cents, being the value of said steamship and her freight, pending at the time of such alleged loss, damage, and injury, with sureties for the payment of said amount into court whenever the same may be so ordered; and that if it shall ultimately be adjudged that the steamship or your petitioners is liable therefor, that a monition issue against all persons claiming any damage by reason of any loss, damage, or injury occasioned by said collision, citing them to appear before this court and make due proof of their respective claims at a time to be therein designated, and that this court would then designate a commissioner, before whom such claims shall be presented in pursuance of such monition, and that it be finally decreed by this court that the amount of the aforesaid stipulation (after payment of all costs and expenses) shall and may be divided pro rata among the several claimants in proportion to the amount of their several claims, and that upon the payment by your petitioner of the amount of such stipulation a decree be made and entered herein forever discharging the steamship Benefactor, her engine, &c., and your petitioner as claimant thereof, of, from, and against all and every claim by reason of any loss, damage, or injury occasioned by said collision, and that an order be made herein restraining the libellants or their proctors in each of the above-mentioned suits from the further prosecution of said suits, and that the court will, upon
9 the testimony taken on the trial of the above-mentioned suits, proceed to hear and determine your petitioner's liability under these proceedings, and that upon so doing your petitioner may be permitted to appeal from such last-mentioned decree without giving further or other security than that required by the aforesaid act limiting its liability, and the rules and practice thereunder, and that the testi-

mony taken in this court upon the trial of said causes be used on said appeal with the like effect as though originally taken in this proceeding, and that they may have and receive such other and further order in the premises as in equity they may be entitled to receive.

And your petitioner will ever pray, &c.
Dated New York, February 14th, 1877.

NEW YORK & WILMINGTON S. S. Co.,
By FRED. A. SAWYER, *Secretary.*

OWEN & GRAY,
Proctors for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick A. Sawyer, being duly sworn, says that he is secretary of the New York and Wilmington Steamship Company, the petitioner in the foregoing petition named; that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

FRED. A. SAWYER.

Sworn to before me this fourteenth day of February, 1877.
[L. S.]

S. G. LEATHEM,
Notary Public, New York Co.

10 At a stated term of the district court of the United States for the eastern district of New York, held at the United States court rooms, in the city of Brooklyn, on the 21st day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Present, Hon. Chas. L. Benedict, district judge.

WILLIAM H. MOUNT, ADAM PARTRIDGE, GORDON D. WHITE, ARION B. LONGSTREET, DENNIS YOU, ADAM B. JOHNSON, SENECA PARTRIDGE, and JUSTICE NELSON, and THE SUN MUTUAL INSURANCE COMPANY, and THE UNION MUTUAL INSURANCE COMPANY, and WILLIAM HIRST, CHARLES LUKENS, and JOHN COLLINS,
vs.
THE STEAMSHIP BENEFACTOR, HER ENGINES, tackle, &c.

Upon the record and proceedings in the two several suits in this court on behalf of William H. Mount and others, and William Hirst and others, against The Steamship Benefactor, her engines, tackle, &c., which, under and by virtue of the order of this court, bearing date the 20th day of October, 1876, were consolidated into the present suit; and upon the reports of B. Lincoln Benedict, United States commissioner, to whom it was referred to ascertain the damage to the libellants in
11 said suits by reason of the matters in the libels therein alleged (which reports have been heretofore duly confirmed by this court), whereby it appears that at the date of said reports there was due to the libellant William H. Mount for the loss of personal effects, the sum of one thousand four hundred dollars and twenty-six cents ($1,400.26); to the libellants William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Jackson, Seneca Partridge,

and Justice Nelson, for loss of vessel, the sum of nineteen thousand four hundred and sixty-eight dollars and fifty cents ($19,468.50), and for loss of freight the sum of two thousand and ninety-six dollars and sixty-two cents ($2,096.62); and to the co-libellants, The Sun Mutual Insurance Company and The Union Mutual Insurance Company, for loss on cargo, the sum of thirty-eight thousand two hundred and twenty-four dollars and twelve cents ($38,224.12), and to the libellant William Hirst, for loss of personal effects, the sum of two hundred and sixty-five dollars and ninety-six cents ($265.96); to the libellant Charles Lukens, for loss of personal effects, the sum of one hundred and seventy-nine dollars and eighty-five cents ($179.85); and to the libellant John Collins, for loss of personal effects, the sum of one hundred and ninety-eight dollars and fifty-four cents ($198.54); and the costs of the said libellants William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Jackson, Senaca Partridge, and Justice Nelson having been duly taxed and adjusted at the sum of five hundred and twenty-five dollars and thirty-five cents ($525.35); and the costs of the co-libellants the said The Sun Mutual Insurance Company and the Union Mutual Insurance Company having been duly taxed and adjusted at the sum of forty-four dollars and thirty-five cents ($44.35), and the costs of the libellants William Hirst, Charles Lukens and John Collins,
12 having been duly taxed and adjusted at the sum of eighty-nine dollars ($89), and the said former suits having been by said order, bearing date the 20th day of October, 1876, duly consoli. dated into the present suit:

Now, on motion of Beebe, Wilcox & Hobbs, proctors for the libellants above named, and of Evarts, Southmayd & Choate, proctors for the co-libellants, above named, it is

Ordered, adjudged, and decreed, that the libellant William H. Mount recover herein the sum of one thousand four hundred dollars and twenty-six cents ($1,400.26), with interest from the date of the said report, amounting together to the sum of one thousand four hundred and twelve dollars and fifty one cents ($1,412.51), and that the libellants William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Jackson, Seneca Partridge, and Justice Nelson recover herein the sum of twenty-one thousand five hundred and sixty-five dollars and twelve cents ($21,565.12), with interest from the date of said report, besides five hundred and twenty-five dollars and thirty-five cents ($525.35) costs as taxed, making altogether, including such interest, the sum of twenty-two thousand two hundred and seventy-nine dollars and sixteen cents ($22,279.16); that the said co-libellants the Sun Mutual Insurance Company and The Union Mutual Insurance Company recover herein the sum of thirty-eight thousand two hundred and twenty-four dollars and twelve cents ($38,224.12), with interest thereon from the date of said report, besides forty-four dollars and thirty-five cents ($44.35) costs, making together, including such interest, the sum of thirty-eight thousand six hundred and two dollars and ninety-three cents ($38,602.93); that the said libellant William Hirst recover herein the sum of two hundred and sixty-five dollars and ninety-six cents ($265.96), with interest thereon from the date of said report, amounting together to the sum of two hundred and
sixty-eight dollars and twenty-three cents ($268.23); that the
13 said libellant Charles Lukens recover herein the sum of one hundred and seventy-nine dollars and eighty-five cents ($179.85), with interest thereon from the date of said report, amounting together to the sum of one hundred and eighty-one dollars and thirty-eight cents

($181.38); that the said libellant John Collins recover herein the sum of one hundred and ninety-eight dollars and fifty-four cents ($198.54), with interest thereon from the date of said report, amounting together to the sum of two hundred dollars and twenty-three cents ($200.23;) and that the said libellants William Hirst, Charles Lukens, and John Collins recover herein the sum of eighty-nine dollars ($89), the amount of their costs as taxed, and that said steamship Benefactor, her engines, tackle, &c., be condemned therefor.

And it appearing to the court that heretofore, and on or about the 23d day of March, 1875, stipulations for costs in the usual form were filed in this court on behalf of the New York and Wilmington Steamship Company, claimant of the said steamship Benefactor, her engines, tackle, &c., in the sum of two hundred and fifty dollars ($250) in each of said former suits, which stipulations were duly executed by the said New York and Wilmington Steamship Company, as principal, and Andrew Boardman and Frederick Butterfield, as sureties; and it also appearing to the court that on or about the 23d day of March, 1875, and under and in pursuance of the provisions of an order theretofore made and entered in each of the said suits, and bearing date the 20th day of March, 1875, to which reference is made for its contents, the said claimant entered into and filed a stipulation in the appraised value of said steamship, to wit, the sum of forty thousand dollars ($40,000), with interest thereon from the said 23d day of March, 1875, which said last mentioned stipulation was duly executed by the said New York and Wilmington Steamship Company, as principal, and Thomas
14 Clyde, Andrew Boardman and Frederick Butterfield, as sureties, all of which said stipulations (referred to, which is hereby made as part of this decree) still remain in full force and effect.

And whereas it is provided in said order that such stipulation should be for the benefit of the libellants in both of said suits against said steamship (in case they should establish the liability of said steamship), and of all persons and parties who might, by due proceedings in this court, show themselves entitled to liens upon said steamship by reason of the collision on the libel mentioned, and that upon the entering into and filing such stipulation, the said steamship, her engines, &c., should be discharged from all liability for losses and damages occasioned to all parties for whose benefit said stipulation should be given, as by reference to said order will more fully appear.

And whereas no other libels or claims have been filed nor proceedings taken by any other parties than those mentioned in the libels above mentioned, or included therein by petition or otherwise:

Now, on like motion, it is further ordered, adjudged, and decreed that the said the New York and Wilmington Steamship Company, principal, and the said Andrew Boardman and Frederick Butterfield, sureties, pay into the registry of this court the amount of their said stipulations for costs, to wit, the sum of five hundred dollars ($500); and that the said New York and Wilmington Steamship Company, principal, and Thomas Clyde, Andrew Boardman, and Frederick Butterfield, sureties, pay into the registry of this court the amount of their said stipulation for value, to wit, the said sum of forty thousand dollars ($40,000), with interest thereon from the 23d day of March,
15 1875, amounting, with said interest, to the sum of forty-four thousand four hundred and seventeen dollars and ninety-one cents ($44,417.91), or show cause why execution should not issue against them, their goods, chattels, and credits, therefor.

And, on like motion, it is further ordered, adjudged, and decreed that

unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the clerk distribute the proceeds of said stipulations among the libellants and co-libellants herein in proportion to the amounts of the several recoveries awarded to said libellants and co-libellants respectively in this decree.

CHAS. L. BENEDICT.

(Endorsed:) Petition filed February 15th, 1877.

U. S. district court, eastern district of New York.

In the matter of the petition of the New York and Wilmington Steamship Co., owners of the steamship Benefactor, her engines, &c.

The libellants and co-libellants in the suits of William H. Mount and others, and William Hirst and others, against the above named vessel, her tackle, &c., referred to in the petition herein (being also the libellants in the consolidated suit therein mentioned), hereby except to the said petition, as follows, to wit:

16 First. For that no other suit or proceeding for any loss, damage, destruction or injury occasioned by the collision between the steamship Benefactor and the schooner Susan Wright, in the said petition mentioned, having been commenced against the said steamship Benefactor or the said petitioner than the suits of William H. Mount and others, and of William Hirst and others, against the said steam, ship, heretofore consolidated into one suit, as by the said petition appears. And the said petitioner having, before the filing of its petition herein, filed a stipulation in said suits for the appraised value of said steamship for the equal pro rata benefit of the libellants in said two suits, and any other persons or parties who might have any claims growing out of said collision, and having thereby procured the discharge of said steamship from arrest in such suits, or tender any such claims as by said petition appears, and it not being alleged or claimed that any other persons or parties than the libellants in said suits have any claims for any loss, damage, destruction or injury done or occasioned by the said collision, but the contrary thereof appearing on the face of said petition, the petitioner is not entitled to have the relief sought in and by the said petition.

Second. For that the said two suits of William H. Mount and others, and William Hirst and others, against the said steamship Benefactor having been tried upon the merits, and submitted and determined, and the final decree, a copy whereof is annexed to the said petition, having been entered in the suit formed by the consolidation of such two suits, before the filing of the petition herein; and no other suit or proceeding, for any loss, damage, destruction or injury occasioned by said collision, having been commenced, and it not being alleged or claimed that

17 any other persons or parties than the libellants in said two suits (being the libellants in said consolidated suit) have any claims for loss, damage, destruction or injury occasioned by said collision, but the contrary thereof appearing upon the face of said petition, the petitioner is not entitled to the relief sought in and by its said petition.

Third. For that the facts stated in said petition show that the relief sought thereby cannot now be granted by this court.

BEEBE, WILCOX & HOBBS,
Proct's for Libell'ts.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for The Mutual Ins. Co. and Union Mutual Ins. Co., Libellants.

Let the foregoing exceptions be filed as of the 14th day of February, 1877.

Dated March 26, 1877.

CHAS. L. BENEDICT.

No objection to exception being filed nunc pro tunc.

OWEN & GRAY.

(Endorsed:) Exceptions and order. Filed February 14th, 1877.

18 At a stated term of the district court of the United States for the eastern district of New York, in the second circuit, held at the court rooms of said court, in the city of Brooklyn, on the twenty-sixth day of March, 1877.

Present, Hon. Charles L. Benedict, district judge.

In the matter of the petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, her engines, etc.

Upon reading and filing the petition of the New York and Wilmington Steamship Company, petitioners herein, sworn to on the 14th day of February, 1877, and the copy thereto annexed of the decree of this court heretofore entered in the suit of William H. Mount, Adam Partridge, Gordon D. White, Aaron B. Longstreet, Dennis You, Adam B. Johnson, Seneca Partridge, and Justice Nelson, and the Sun Mutual Insurance Company, and The Union Mutual Insurance Company, and William Hirst, Charles Lukens, and John Collins against the steamship Benefactor, her engines, tackle, &c., and the New York and Wilmington Steamship Company, claimants (the same being the consolidated suit referred to in the said petition), and the said petitioner applying, upon notice to the proctors, for the libellants in said consolidated suit for an order restraining the libellants or their proctors for the further prosecution of said suit, after hearing C.
19 Van Santvoord and Edward L. Owen on behalf of the said petitioners, and Franklin A. Wilcox and Charles H. Tweed on behalf of the libellants in said consolidated suit, and after due deliberation thereon:

It is ordered that the said motion for an order restraining the prosecution of said consolidated suit be, and the same is hereby, denied.

And the proctors for the said libellants in said consolidated suit having duly excepted to the said petition of the petitioners, and the said exceptions having been duly filed,

And the said exceptions to said petition having duly come on to be heard before the court, after hearing Franklin A. Wilcox and Charles H. Tweed on behalf of said libellants in said consolidated suit, and C. Van Santvoord and Edward L. Owen on behalf of said petitioners,

It is ordered, adjudged, and decreed that the second and third of the exceptions above referred to be, and the same are hereby, sustained.

And it is further ordered, adjudged and decreed that the said petition be, and the same is hereby, dismissed, but without costs.

CHARLES L. BENEDICT.

(Endorsed:) Order sustaining exceptions. Filed March 28th, 1877.

20 Circuit court of the United States for the eastern district of New York.

In the matter of the petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, her engines, &c., for limitation of liability, appellant.

The petition and appeal of the above-named petitioner showeth:

That on or about the 14th day of February, 1877, your petitioner filed its petition in the district court of the United States, within and for the eastern district of New York, claiming the benefits of limitation of liability provided for by § 4283 of the Revised Statutes of the United States, by reason of a collision which occurred between your petitioner's steamship Benefactor and the schooner Susan Wright, in which said petition your petitioner also claimed to be entitled to contest its liability for the damages occasioned by said collision, as by reference to said petition will more fully and at large appear, and to which reference is made for its contents.

That thereafter said petition came on to be heard before the honorable Charles L. Benedict, judge of said district court, and the said judge having advised thereon on the 20th day of February, 1877, made a final order or decree, bearing date that day, dismissing your petitioner's petition, as by reference to said decree will more fully and at large appear, and to which reference is made for the contents thereof.

21 And this appellant is advised and insists that said decree is erroneous, inasmuch as the prayer of said petition should have been granted, and your petitioner have been adjudged to be entitled to the benefit of limitation of liability provided for by said § 4283 of the Revised Statutes of the United States, upon complying with the provisions of the rules and practice in that behalf.

And the appellant, for these and other reasons, appeals from the whole of said decree to the next circuit court to be held in said district, and upon said appeal intends to seek a new decision and to pray a different relief.

And your petitioner prays that said decree and every part thereof may be reversed with costs, and that such other decree be thereupon made according to the prayer of said petition, or as to the said circuit court shall seem just.

And this appellant will ever pray, &c.

Dated New York, March 2, 1877.

OWEN & GRAY,
Proctors for App'l'ts.

(Endorsed:) Petition of appeal. Filed March 28, 1877.

Bond.

Know all men by these presents, that we the New York and Wilmington Steamship Company and Frederick A. Sawyer, are held and firmly bound unto William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Johnson, Seneca B. Partridge, Justice Nelson, The Sun Mutual Insurance Company, The Union Mutual Insurance Company, Willam Hirst, Charles Lukens, and John Collins, and all persons claiming damage arising out of a collision between the steamship Benefactor and the schooner Susan Wright

22 in the sum of five hundred dollars to be paid to the said Will-

iam H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Johnson, Seneca B. Partridge, Justice Nelson, The Sun Mutual Insurance Company, The Union Mutual Insurance Company, William Hirst, Charles Lukins, and John Collins and all persons claiming damages arising out of the collision aforesaid, their executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the ninth day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas, the New York and Wilmington Steamship Company, as appellant, has appealed to the circuit court of the United States, for the eastern district of New York, in the second circuit, from a decree of the district court of the United States for the said eastern district, bearing date the 20th day of February, 1877, in the matter of the petition of the New York and Wilmington Steamship Company for limitation of liability:

Now, therefore, the condition of this obligation is such, that if the above named appellant, the New York and Wilmington Steamship Company, shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against it as such appellant therein, if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE NEW YORK & WILMINGTON
STEAMSHIP COMPANY, [L. S.]
By FRED. A. SAWYER, [L. S.]
Secretary,

FRED. A. SAWYER.

Sealed and delivered and taken and acknowledged this 3d day of March, 1877, before me.

EDWARD L. OWEN,
U. S. Commissioner.

23 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederick A. Sawyer, being duly sworn, deposes and says that he resides in the southern district of New York; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

FRED. A. SAWYER.

Sworn to this 3d day of March, A. D. 1877, before me,
EDWARD L. OWEN,
U. S. Commissioner.

This bond approved as to form and amount and sufficiency of surety.
CHARLES L. BENEDICT.

(Endorsed:) Filed March 27th, 1877.

U. S. district court, eastern district of New York.

In the matter of the petition of the owners of the steamship Benefactor, &c.

FEBRUARY 20, 1877.

BENEDICT, J.

In March, 1875, certain actions were instituted in this court against

the steamship Benefactor, to recover for losses occasioned by the sinking of the schooner Susan Wright, in a collision that occurred on the 25th day of February, 1875.

24 The steamship having been seized in this action, her owners, who are the present petitioners, applied for leave to file a stipulation in her full appraised value, for the benefit of all persons who may have demands arising out of said collision, and upon the giving of such stipulation to receive the said steamship discharged from all liability to arrest upon such demands.

Permission being given, the steamer was appraised, and a stipulation in the sum of $40,000 having been been filed, the steamer was released from arrest. The stipulation so given was in the form heretofore adopted in similar cases.—(See stipulation given for "City of Norwich," 1 Ben., p. 103.)

Thereafter, the several actions against the steamer were consolidated, and a trial upon the merits having been had, a final decree was rendered in favor of the libellants for the sum of $60,810.49, and the amount for which the stipulations for value were bound, that is to say, the appraised value of the vessel, with interest from the date thereof, such being the provision in the stipulation, was decreed to be distributed among the several libellants in proportion their respective demands as ascertained in said action.

After the entry of the above mentioned decree the owners of the steamship filed the present petition to obtain a limitation of their liability, as provided by the § 4283 U. S. Rev. Stat., and general admiralty rules Nos. 54, et seq.

To this petition exception is taken by those who were parties libellant in the consolidated action in rem against the steamer, upon the ground that the facts stated in the petition show that the relief sought thereby cannot now be granted by this court.

This exception, which has been treated as having an effect similar to a demurrer at common law, is based upon two grounds; one ground is, that the proceeding appears on its face to be vain and fruit-

25 less, inasmuch as the petition shows that the libellants in the consolidated action represent all existing demands arising out of the collision in question; and, also, that by the decree already entered in that action, the value of the steamer being represented by the stipulation given in that action, is to be distributed among the said libellants.

This ground of exception does not appear to me to be well founded. It cannot be said that the result of the present proceeding will be the same as the result already attained by the action in rem, because, in the first place, the stipulation given in the action in rem is not for the same amount as that sought to be given in the proceedings. The stipulation in rem is for the value of the steamer at the time of her arrest, with interest from the date of her release, such being the terms of the stipulation. The stipulation sought to be given under this petition is for the value of the steamer and of her freight then pending.

In the second place, the petition', in addition to a distribution of the value of the steamer and her freight pending among the persons having claims for losses arising out of the collision in question, are entitled to seek the further relief that this court would not only restrain all further proceedings in the action in rem, but also all proceedings against the petitioners in personam to recover for such loss. The relief sought by this proceeding in behalf of the owners of the steamer, they cannot therefore obtain in the proceeding in rem. To secure the relief sought

by the petitioners this petition is not only not vain, it is necessary. And here I deem it proper to repeat what has been said on other occasions—that the practice of taking such stipulations as the one given in the action against this steamer has proved to be convenient and advan-
26 tageous, for it enables a vessel seized to be released at once from liability to arrest, while at the same time the right of her owners to obtain the benefit of the limited liability act by means of the proceedings authorized by the general admiralty rules is no way impaired thereby. The proceeding under the statute and the general admiralty rules have been treated in this court as wholly distinct from any action in rem that may be pending, and it takes effect upon such action only by means of the restraining order authorized by rule 54.

It would be regretted, therefore, if it should be found necessary to determine that the giving of such a stipulation as was given in the action against this steamer had any effect to impair the rights derived from the limited liability act, or was a waiver of the right to present this petition. In my opinion no such determination is necessary or proper, and I therefore hold that the right to the relief sought by this petition was not impaired by the giving of the stipulation that was given in the action in rem.

But a second ground of exception to this petition is presented for consideration, namely, that the petition is too late and cannot now be entertained, inasmuch as it appears upon the face of the petition that prior to its being filed the action in rem sought to be restrained had proceeded to a final decree after a hearing upon its merits. This objection I believe to be well taken.

It is true that the general admiralty rules under which the petition is filed do not contain any express limitation of the time within which the proceedings authorized thereby may be taken. Nevertheless, some limitation is clearly implied. Thus, it is quite manifest that it was intended that the petition should be filed before the action sought to be restrained should have been taken by appeal from the district to the circuit court, and I think it may also be inferred that it was the intention that the proceedings should be instituted before a final decree
27 upon the merits, after hearing upon the pleadings and proofs in such action. For it will be observed that the rules permit the question of liability to be raised by the petition and to be tried in the proceedings taken thereon. So this petition contains a full statement of the circumstances attending the collision in question, and seeks a determination of the question of negligence as preliminary to a resort to the stipulation tendered. And I am invited to consider anew the evidence in respect to the collision in question, and to say over again whether or not I find the steamer in fault.

But it could never have been intended to permit a second trial of the question of liability. The permission given to present that question in the petition, therefore, shows that the right to resort to proceedings by petition must be exercised, if at all, before a trial upon the question of liability has been had in the action sought to be restrained, while the libel is in esse, and before the demand has passed into the form of a final decree.

Whether any other limitation can be derived from the language of the rules or that of the limited liability act, it is not now necessary to consider.

My conclusion, therefore, is that, inasmuch as it appears by the petition under consideration that prior to the filing thereof a hearing upon the merits had been had in the action sought to be restrained, and that

the rights of the libellants had become fixed, as far as this court is concerned, by the final decree of this court entered in such action, it is now too late to resort to this proceeding.

There will, therefore, be a decree entered herein dismissing the petition, but without costs.

28 United States circuit court, eastern district of New York, in the second circuit.

In the matter of the petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, &c., appellants.

JUNE 11TH, 1877.

The opinion of Judge Benedict upon the above petition for limiting the liability of the said company appears to me to be satisfactory, and the decree of the district court dismissing the petition without costs is affirmed.

WARD HUNT.

29 At a stated term of the circuit court of the United States for the eastern district of New York, in the second circuit, held at the court rooms of said court in the city of Brooklyn, on the 13th day of June, 1877.

Present, Hon. Ward Hunt, justice.

In the matter of the petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, her engines, &c.

The New York and Wilmington Steamship Company, the petitioner in the above entitled matter, having appealed to this court from the order and decree heretofore made therein by the district court of the United States for the eastern district of New York, and bearing
30 date the 26th day of March, 1877, and the said appeal having duly come on to be heard before this court, after hearing Edward L. Owen and C. Van Santvoord, esquires, on behalf of the appellant, and Franklin A. Wilcox, Charles H. Tweed and Robert D. Benedict, esquires, on behalf of the respondents, and after due deliberation thereon—

It is ordered, adjudged and decreed that the said order and decree of said district court so appealed from, be and the same is hereby, in all respects affirmed with costs. And it is further ordered, adjudged, and decreed that the motion of said appellant for an order restraining the prosecution of the consolidated suit referred to in said order and decree of said district court, be and the same is hereby denied, and that the second and third exceptions of said respondents to the petition of said appellant referred to in said order and decree of said district court, be and the same are hereby sustained, and that the said petition be
31 and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that the said respondents, William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Johnson, Seneca B. Partridge, Justice Nelson, William Hirst, Charles Lukens and John Collins, recover against the New York and Wilmington Steamship Company, the said petitioner the sum of forty-five dollars and forty-five cents, the costs of said respondents upon such appeal herein as taxed. And that the respondents the Sun Mutual Insurance Company and the Union Mutual Insurance Company recover against the said the New York and

Wilmington Steamship Company the sum of forty-nine dollars, the costs of said last mentioned respondents herein as taxed.

And it is further ordered that upon the bond on appeal herein,
32 judgment be and the same is hereby entered in favor of the said William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Johnson, Seneca B. Partridge, Justice Nelson, The Sun Mutual Insurance Company, The Union Mutual Insurance Company, William Hirst, Charles Lukens and John Collins, against The New York and Wilmington Steamship Company and Frederick A. Sawyer, in the sum of ninety-four dollars and forty-five cents.

And it is further ordered that unless an appeal be taken from this decree within the time limited by law for a stay of execution, the said respondents have execution to obtain satisfaction of this decree.

WARD HUNT.

(Endorsed:) Decree of affirmance, filed June 20th, 1877.

33 U. S. circuit court, eastern district of New York.

In the matter of the petition of the New York and Wilmington Steamship Company, owners of the steamship Benefactor, her engines.

Take notice that the New York and Wilmington Steamship Company, petitioners and owners of the steamship Benefactor, her engines, &c., hereby appeal to the Supreme Court of the United States from the whole and every part of the final decree bearing date the 13th day of June, 1877, and filed with the clerk of this court on the 20th day of June, 1877, affirming the decree of the district court herein.

Dated New York, June 21st, 1877.

Yours, &c.,

OWEN AND GRAY,
Proc. for Petitioners & Appellant.

To B. LINCOLN BENEDICT,
Clerk, &c.

Mess. BEEBE, WILCOX & HOBBS,
Proctors for Mount & Others.

Mess. EVARTS, SOUTHMAYD & CHOATE.
Proctors for Insurance Company.

(Endorsed:) Notice of appeal filed June 22nd, 1877.

34 Supreme Court of the United States.

In the matter of the petition of the New York and Wilmington Steamship Company, owner of the steamship Benefactor, her engine, & for limitation of liability, appellant.

The petition and appeal of the above-named petitioner sheweth:

That on or about the 14th day of February, 1877, your petitioner filed its petition in the district court of the United States within and for the eastern district of New York, claiming the benefit of limitation of liability provided for by § 4283 of the Revised Statutes of the United States, by reason of a collision which occurred between your petitioner's steamship Benefactor and the schooner Susan Wright, in which
35 said petition your petitioner also claimed to be entitled to contest

its liability for the damages occasioned by said collision, as by reference to said petition will more fully and at large appear, and to which reference is made for its contents.

That thereafter said petition came on to be heard before the honorable Charles L. Benedict, judge of said district court, and said judge having advised thereon on the 20th day of February, 1877, made a final order or decree bearing date that day, dismissing your petitioner's petition, as by reference to said decree will more fully and at large appear, and to which reference is made for the contents thereof.

That after such final decree your petitioner duly appealed therefrom to the circuit court of the United States for the eastern district of New York, and the said cause was removed thereby to the said circuit
36 court, and such proceedings were had in the said circuit court that afterwards, on the 13th day of June, 1877, the said circuit court made a final decree in the said cause, which said decree was filed in the clerk's office of said circuit court on the 20th day of June, 1877, whereby it was decreed that the said decree of the district court *of the district court* be in all things affirmed, as by reference to said decree will more fully appear, and to which reference is made for its contents.

And this appellant is advised and insists that said decree is erroneous, inasmuch as the prayer of said petition should have been granted and your petitioner have been adjudged to be entitled to the benefit of limitation of liability provided for by section 4283 of the Revised
37 Statutes of the United States, upon complying with the rules and practice in that behalf.

Wherefore this appellant appeals from said decree, and the whole and every part thereof, to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court and the petition and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will be pleased to hear said cause and petition anew, and that the said decree of the circuit court may be reversed and a decree made adjudging that your petitioner is entitled to the benefit of limitation of liability provided for by said § 4283 of the Revised Statutes of the United
38 States with costs, or such other decree made as to the Supreme Court shall seem just.

And your petitioner will ever pray, &c.

Dated Brooklyn, July 5th, 1877.

OWEN & GRAY,
Proctors for Petitioners and Appellants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James C. Alley, being duly sworn, deposes and says that he is fourteen years of age and upwards, and is a clerk in the office of Owen and Gray, esquires, the proctors for the petitioners in the within petition named; that on the fifth day of July, A. D. 1877, he served a copy of the within petition on Evarts, Southmayd & Choate, esquires, at their office, No. 52 Wall street, New York City, by leaving a copy thereof with the person in charge of said office, neither member of the said firm being present at the time, between the hours of one and two p. m. of said day.

39 And deponent further says that on the day and year aforesaid he also served the within petition on Messrs. Beebe, Wilcox & Hobbs, at their office, at No. 68 Wall street, in the city aforesaid, by leaving a copy thereof with the person in charge of said office, neither mem-

ber of the said firm being present at the time, between the hours of one and two p. m. of said day.

JAMES C. ALLEY.

Subscribed and sworn to before me this 5th day of July, 1877.

S. G. LEATHEM,
Notary Public, New York Co.

(Endorsed:) Petition of appeal, filed July 6th, 1877.

40 *Bond for costs.*

Circuit court of the United States of America for the eastern district of New York, in the second circuit.

In the matter of the petition of the New York and Wilmington Steamship Company, owner of the steamship "Benefactor," her engine, & for limitation of liability.

Know all men by these presents that we, the New York and Wilmington Steamship Company and Frederic A. Sawyer, are held and firmly bound unto William H. Mount and others in the sum of five hundred dollars, to be paid to the said William H. Mount & others, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 26th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas the above named the New York and Wilmington Steamship Co. has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellant shall prosecute its appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE NEW YORK AND WILMINGTON STEAMSHIP COMPANY, [L. S.]
By FRED. A. SAWYER, *Sec'y.*
FRED. A. SAWYER. [L. S.]

Sealed and delivered and taken and acknowledged this 26th day of June, 1877, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

41 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Frederic A. Sawyer, being duly sworn, depose and say that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

FRED. A. SAWYER.

Sworn to this 26th day of June, A. D. 1877, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Indorsed:) Vol. , page . U. S. circuit court. In the matter of the petition of the New York and Wilmington Steamship Company. Bond for costs on appeal. Owen & Gray, petitioners, proctors. Approved July 5th, 1877. Chas. L. Benedict. Filed this 5th day of July, 1877.

42 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-one inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the New York and Wilmington Steamship Company, owners of the steamship "Benefactor," &c., as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this twenty-second day of September, A. D. 1877, and of the Independence of the said United States the 102nd.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

43 By the honorable Charles L. Benedict, one of the judges of the circuit court of the United States for the eastern district of New York, in the second circuit.

To William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Jackson, Seneca Partridge, Justus Nelson, The Sun Mutual Insurance Company, The Union Mutual Insurance Company, William Hirst, Charles Lukens, Hugh McAdam, & John Collins.

Whereas the New York & Wilmington Steamship Company, owner of the steamship Benefactor, her engine, &c., petitioner, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of New York, in the second circuit, dismissing the petition of said The New York & Wilmington Steamship Company, for limitation of liability, stating that said decree is erroneous in its petition of appeal alleged, and praying that the said cause & petition may be heard anew, and that the said decree may be reversed; and the said The New York & Wilmington Steamship Company having duly entered their said appeal to the Supreme Court of the United States & filed the security required by law:

You are therefor' hereby cited to appear before the said Supreme
44 Court of the United States, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice, to be done in the premises. Given under my hand, at the city of Brooklyn, in the eastern district of New York, in the second circuit, the 5th day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

CHAS. L. BENEDICT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James C. Alley, being duly sworn, deposes and says that he is fourteen years of age and upwards, and is a clerk in the office of Owen & Gray, esquires, the proctors for the petitioners in the within citation named; that on the fifth day of July, 1877, he served the within cita-

tion on Mess's Evarts, Southmayd, & Choat, at their office, No. 52 Wall street, New York City, by leaving a copy thereof with the person in charge of said office, neither member of the said firm being present at the time, and at the same time exhibiting this the original citation, and showing the signature of Chas. L. Benedict thereto to such person.

Deponent further says that on the day and year aforesaid he also served the within citation on Mess's Beebe, Wilcox & Hobbs, the proctors for libellants in the within entitled matter, at their office, No. 68 Wall street, in the city aforesaid, by leaving a copy thereof with the person in charge thereof, neither member of the said firm being present at the time, at the same time exhibiting this the original citation, and showing the signature of Chas. L. Benedict thereto such person.

JAMES C. ALLEY.

Subscribed & sworn to before me this fifth day of July, 1877.
[SEAL.]
S. G. LEATHEM,
Notary Public, New York Co.

(Indorsed:) U. S. Supreme Court. In the matter of the petition of The New York and Wilmington Steamship Company, owner of the steamship Benefactor, her engines, &c., &c. Citation. Owen & Gray, proc's for petitioners & appel., 71 Wall st. Due service of a copy of the within admitted this 5 day of July, 1877. Filed July 6th, 1877.

(Indorsement on cover:) No. 324. The New York & Wilmington Steamship Company, appellant, vs. William H. Mount, Adam Partridge, et al. E. New York C. C. U. S. Filed 22 October, 1877.

EVENING POST PRINT, 208 B'way, N. Y.

OFFICE SUPREME COURT U. S.
FILED
NOV 5 1880
JAMES H. McKENNEY, Clerk.

U. S. Supreme Court.

IN THE MATTER

of

THE PETITION OF THE NEW YORK & Wilmington Steamship Company, as Owner of the Steamship *Benefactor*, her Engines, &c., for an apportionment of the amount or value of said steamship and her freight, then pending among the claimants entitled thereto for damages or losses, from a collision of said steamship with the schooner *Susan Wright*, on 26th February, 1875, and for the benefit of the limited liability under the Act of Congress in that behalf.

Brief and Points of Petitioner, the Appellant.

I.—STATEMENT OF THE CASE.

This is an appeal by the New York & Wilmington Steamship Company, the petitioner in the matter aforesaid, from a decree of the Circuit Court for the Eastern District of New

York, bearing date 13th June, 1877, affirming with costs the decree of the District Court for the Eastern District of New York, bearing date 26th March, 1877, denying the motion of the petitioner for an order restraining the further prosecution of the consolidated suit therein referred to, and dismissing the petition of the petitioner.

Libels *in rem* were filed against the *Benefactor* in said District Court, on the 4th day of March, 1875; one by the owners of the schooner, William H. Mount, Adam Partridge, Gordon D. White, Arion B. Longstreet, Dennis You, Adam B. Johnson, Seneca Partridge and Justice Nelson (names recited in the copy decree annexed to the petition), to recover the damages sustained by them as owners of said schooner, and as common carriers of the cargo laden on board, by the collision; and on the same day another libel was filed by the seamen on board said schooner, William Hirst, Charles Lukens and John Collins (names from recitals in said decree), against the steamship, to recover the damages by them sustained for loss of personal effects; and thereafter, the owners of the cargo, the Sun Mutual Insurance Company and the Union Mutual Insurance Company (names from the decree) intervened as co-libellants in the suit commenced by the owners of the schooner.

By order of the court the steamship was duly appraised, and her value was, by such appraisement, fixed at the sum of forty thousand dollars.

And the petitioner as claimant, having appeared as owner upon the seizure of said steamship upon process issued pursuant to the prayers of the libels, obtained an order made and entered in each of the said causes, on the 20th day of March, 1875, whereby it was ordered that the New York & Wilmington Steamship Company (the petitioner) have leave to give a stipulation with sufficient sureties in the appraised value of said steamship, and that such stipulation should be for the benefit of the libellants in both of said suits against said steamship, *and of all persons and parties who might by due proceedings in that court*, show themselves entitled to liens upon said steamship by reason of the collision in the libels mentioned, and that upon the entering into and filing such stipulation the said steamship, her engine, &c., should be discharged from all liability for losses and damages occasioned

to all the parties for whose benefit said stipulation should be given, as by reference to said order will more fully appear:

In pursuance of the order, the claimant, on the 22d day of March, 1875, entered into and filed a stipulation with sufficient sureties in the appraised value of said steamship, to wit, the sum of forty thousand dollars, with *interest to stand in place of said steamship*, her engines, &c., whereupon said steamship, her engines, &c., was discharged from all such losses and damages as aforsaid.

See record on appeal in matter of the petitioner, pp. 1 and 2.

The order for the appraisement of the *Benefactor*, and the further order thereon, the appraisement and its confirmation, and the stipulation for value, are found in the record on appeal in the collision case (pp. 9 to 13).

After the filing of this stipulation, the court was as fully in possession of the steamship, by representation, as if it had the custody of the ship itself, or the proceeds on a sale in the registry. See the Northumbria Law Rep., 3 A. & E. 24.

And under the order that the stipulation should be for the benefit of the libellants (in case they should establish the liability of the steamship), and of all persons and parties who might, by due proceedings in the court, show themselves entitled to liens upon the steamship by reason of the collision in the libels mentioned, the court held the stipulation and its proceeds to be applied, disposed of and distributed, according to the requirement of the law, to and among the claimants entitled to damages or losses (whoever they might be) by reason of the collision in the libels mentioned, when its attention should be called to such requirement.

Answers to each of the libels against said steamship were filed by the claimants, denying all liability on its part by reason of the collision (fol. 4 of Record *in re* the Petition); and each of said causes was tried in the District Court as to the question of fault for said collision, and thereafter interlocutory decrees were made by said court, adjudging that said steamship was the party in fault for said collision, the damages sustained by the libellants were assessed, and reports

made, dated the 28th and 30th August, 1876, showing as reported damages from said collision, in the aggregate amounting to $61,810.49.

And thereafter, after consolidation of the suits by order of the court, a decree was made and entered by said court, bearing date on the 21st day of October, 1876, of which a copy is annexed to the petition (fol. 7 of the Petition).

> The proceedings on the trial, the interlocutory decrees, the report on the assessment of the damages are stated more at length in the record on appeal in the collision cause in case of the *Benefactor*. The order for consolidation on page 102.

By the decree it was adjudged that the libellants respectively recover the sums therein mentioned (pp. 6 and 7 *in re* Petition), which are not footed up in the decree, but which amount in the aggregate, with interest and costs, to $63,033.44; the sums allowed for damages are itemized separately from the costs.

And then it proceeds:

And it appearing to the court, that heretofore, and on or about the 23d day of March, 1875, stipulations for costs in the usual form, were filed in this court, on behalf of the New York & Wilmington Steamship Company, claimants of the said steamship *Benefactor*, her engines, tackle, &c., in the sum of $250 in each of said former suits, which stipulations were duly executed by the said New York & Wilmington Steamship Company, as principal, and Andrew Boardman and Frederick Butterfield, as sureties; and it also appearing to the court, that on or about the 23d day of March, 1875, and under and in pursuance of the provisions of an order theretofore made and entered in each of said suits, and bearing date the 20th day of March, 1875, to which reference is made for its contents, the said claimants entered into and filed a stipulation in the appraised value of the said steamship, to wit, the sum of forty thousand dollars ($40,000), with interest thereon from the said 23d day of March, 1875, which said last mentioned stipulation was duly executed by the said New York & Wilmington Steamship Company, as principal, and Thomas Clyde Andrew Boardman,

and Frederick Butterfield, as sureties, all of which said stipulations still remain in full force and effect.

And whereas, it is provided in said order that such stipulation should be for the benefit of the libellants in both of said suits against said steamship (in case they should establish the liability) *and of all persons and parties who might by due proceedings in this court* show themselves entitled to liens upon said steamship by reason of the collision in the libels mentioned, and that upon the entering into and filing such stipulations, the said steamship, her engines, &c., *should be discharged from all liability for losses and damage occasioned to all parties for whose benefit said stipulation should be given* as by reference to said order will more fully appear.

And whereas, no other libels or claims have been filed nor proceedings taken by any other parties than those mentioned in the libels above mentioned or included therein by petition or otherwise.

Now, on like motion, it is further ordered, adjudged, and decreed, that the said The New York & Wilmington Steamship Company, principal, and the said Andrew Boardman and Frederick Butterfield, sureties, pay into the registry of this court the amount of their said stipulations for costs, to wit, the sum of $500 and that the said New York & Wilmington Steamship Company, principal, and Thomas Clyde, Andrew Boardman and Frederick Butterfield, sureties, pay into the registry of the court the amount of their said stipulation for value to wit, the said sum of forty thousand dollars ($40,000), with interest thereon from the 23d day of March, 1875, amounting with said interest to the sum of forty-four thousand four hundred and seventeen dollars and ninety-one cents ($44,417 $\frac{91}{100}$) *or show cause why execution should not issue against them, their* goods, chattels and credits therefor.

And on like motion it is further ordered, adjudged and decreed that unless an appeal be taken from the decree within the time limited and prescribed by the rules of the court, the clerk distribute the proceeds of said stipulation among the libellants and co-libellants herein, in proportion to the amounts of the several recoveries awarded to said libellants and co-libellants respectively in this decree.

It appearing from the reports of assessment of damages in the suits against the *Benefactor* and the said decree affirming the same, that the amount of the loss, damage and injury

sustained by the owners of said schooner, cargo and personal effects, would greatly exceed the value of said steamship and freight, and that the value and freight pending would not be sufficient to make compensation for the loss aforesaid (fol 8, Record, *in re* Petition), matters which could not be known to the petitioner before the assessments (which were after trial in the District Court) the petition was prepared.

And it was presented to the District Court after the entry of the foregoing decree on 14th February, 1877, which was after the entry of the decree, but before any payment by the stipulators into the registry of the court of the amount of their stipulations or requirement to show cause why execution should not issue against them therefor, and before the time for an appeal had expired before which there could be no distribution therein (see page 4 of the Record,at top.)

The petition is drawn in conformity to the requirement of the supplemental rules of practice in admiralty under the act of March 3, 1851, which designates the District Court for the Eastern District of New York as the proper district court in which it was to be filed, the *Benefactor* having been libelled in that court.

The petition is addressed to the judge of that court.

It sets forth the facts and circumstances on which the limitation of liability was claimed.

That the petitioner is a corporation created by and existing under the laws of the State of New York, and is, and was at the times thereinafter mentioned, sole owner of the steamship *Benefactor*, her engines, &c.

That on the morning of the 26th day of February, 1875, a collision occurred between the steamship *Benefactor* and the schooner *Susan Wright*, whereby the said schooner was sunk, and together with a large cargo of valuable merchandise and the ship stores and personal effects of the officers and crew, became and was a total loss.

That said collision happened, and the loss, damage, injury and destruction above referred to was done, occasioned, and occurred without the privity or knowledge of the petitioner.

That on or about the 4th day of March, 1875, the owners of said schooner filed their libel in this court against said steamship *Benefactor*, to recover the damages sustained by them as owners of said schooner and as common carriers of the cargo

laden on board thereof; and on the same day the seamen on board said schooner at the time of the collision also filed their libel against said steamship, to recover the damages by them sustained for loss of personal effects; that thereafter the owners of the cargo laden on board said schooner, duly intervened as co-libellants in the suit commenced by the owners of said schooner.

That thereafter, by order of the court, said steamship was duly appraised, and her value was by such appraisement fixed at the sum of forty thousand dollars; and it appearing to the court that the New York & Wilmington Steamship Company claimant of the *Benefactor*, her engines, &c., upon the seizure of the said steamship, her engines, &c., upon process issued pursuant to the prayer of the libel, filed in this cause on the 4th March, 1875, by William H. Mount and others, libellants, and upon process issued pursuant to the prayer of another libel by William Hirst and others on the same 4th day of March, 1875, in the same District Court of the United States appeared as owner, and an order was obtained, made, and entered in each of said causes on the 20th day of March, 1875, whereby it was ordered that the New York & Wilmington Steamship Company have leave to give a stipulation with sufficient sureties in the appraised value of said steamship, and that such stipulation should be for the benefit of the libellants in both of said suits against said steamship (in case they should establish the liability of said steamship), and of all persons and parties who might by due proceedings in this court show themselves entitled to liens upon said steamship by reason of the collision in the libels mentioned, and that upon the entering into and filing such stipulation the said steamship, her engines, &c., should be discharged from all liability for losses and damages occasioned to all the parties for whose benefit said stipulation should be given, as by reference to said order will more fully appear, and that in pursuance of such order the claimant did, on the 22d day of March, 1875, enter into and file a stipulation with sufficient sureties in the appraised value of said steamship, to wit, the sum of forty thousand dollars, with interest, to stand in place of said steamship, her engine, &c., whereupon said steamship, her engine, tackle, &c. was discharged from all such losses and damages as aforesaid.

That the value of the freight pending at the time of said loss, damage, injury and destruction, was the sum of twelve hundred and twenty $\frac{32}{100}$ dollars.

That your petitioner has filed answers to each of said libels against said steamship, denying all liability on its part, by reason of the collision.

That each of said causes was tried in that court, as to the question of fault for said collision, on the 21st day of April, 1876, and thereafter interlocutory decrees by said court, adjudging that said steamship was the party in fault for said collision, the damages sustained by the libellants were assessed, and reports made dated the 28th and 29th and 30th of August, 1876, showing as reported damages from said collision in the aggregate amounting to $61,810.19, and thereafter after consolidation of suits by order of the court, a decree was made and entered by said court, on the 20th October, 1876, of which annexed was a copy, which said decree was not final (that is not a final disopsition of the case) being still subject to appeal therefrom to the United States Circuit Court.

That it was ready and willing, and thereby offered to give a stipulation with sureties in the value of said steamship and freight pending at the time of such alleged loss, damages destruction and injury for the payment thereof into court whenever the same may be ordered.

That as appears from the reports of assessments of damages as aforesaid in said suits against said steamship *Benefactor* and said decree affirming the same the amount of the loss, damage and injury sustained by the owners of said schooner, cargo and personal effects, will greatly exceed the value of said steamship and freight pending, which value and freight pending will not be sufficient to make compensation for the loss aforesaid.

In the Prayer.

The petitioner prays that the court will order and direct that the petitioner be permitted to give a stipulation in the sum of $41,220$\frac{32}{100}$, being the value of said steamship and her freight, pending at the time of such alleged loss, damage and injury, with sureties for the payment of said amount into court whenever the same may be so ordered; that a monition issue

against all persons claiming any damage by reason of any loss, damage, or injury occasioned by said collision, citing them to appear before this court and make due proof of their respective claims at a time to be therein designated, and that the court would then designate a commissioner before whom such claims shall be presented in pursuance of such monition, and that it be finally decreed by this court that the amount of the aforesaid stipulation, after payment of all costs and expenses, shall and may be divided *pro rata* among the several claimants, in proportion to the amount of their several claims; and that, upon the payment by the petitioner of the amount of such stipulation, a decree be made and entered herein forever discharging the steamship *Benefactor*, her engine, &c., and the petitioner, as claimant thereof, of and from, and against all and every claim by reason of any loss, damage, or injury occasioned by said collision, and that an order be made therein restraining the libellants or their proctors, in each of the above mentioned suits, from the further prosecution of said suits. * * *And that they may have and receive such other and further order in the premises* as in equity they may be entitled to.

There are other allegations in the petition interwoven with the foregoing, authorized by the 56th of the Admiralty rules, to wit, a statement of the facts and circumstances, by reason of which exemption ftom liability is claimed independently of the limitation of liability claimed, being a statement of the substance of the answers in the District Court of tne claimant to charge of fault for the collision (pp. 2–3 of the Record).

The statement of the petitioner's desire (in seventh articl) as well to contest its liability, as well as that of said ship, for the alleged loss, damage, destruction and injury occasioned by said collision in the proceedings upon the petition, and also to claim the benefit of limitation of liability provided for by section 4283 of the Revised Statute of the U. S.

An allegation that the petitioner, for the purpose of facilitating the proceedings therein, was ready and willing, and thereby offered to admit in evidence, in the proper stage of the proceedings to be had on the petition, the depositions and other proofs taken in said suits against said steamship referred to, and prayer that the court would, upon the testimony taken upon the trials of the above-mentioned suits, proceed to hear and deter-

mine the petitioner's liability under the proceedings in the petition, and that, upon so doing, the petitioner might be permitted to appeal from such last-mentioned decree without giving further or other security than required by the act limiting liability and the rules and practice thereunder, and that the testimony taken in the court upon the trial of said causes be used on such appeal—under which it was entirely competent for the judge to incorporate the evidence on the question of fault, and to make the same decision he had done before on the question of fault, and to incorporate the proofs of amount of damage as the basis of the apportionment.

The presentation and filing of the petition in the District Court was with previous notice to the libellants in the suits, in whose favor the decree was made in those suits, of a motion for an order restraining the prosecution of said consolidated suit (which would have restrained only the further prosecution for collection).

The opposition to the motion and to the petition was formulated in exceptions (on p. 8 of the Record).

The first exception was overruled.

The second exception was as follows:

Second.—For that the said two suits of William H. Mount and others and William Hirst and others against the steamship *Benefactor* having been tried upon the merits, and submitted and determined, and the final decree, a copy whereof is annexed to the petition, having been entered in the suit formed by the consolidation of such two suits before the filing of the petition herein; and no other suit or proceeding for any loss, damage, destruction or injury occasioned by said collision having been commenced, and it not being alleged or claimed that any other person or parties than the libellants in said two suits (being the libellants in said consolidated suit) have any claims for loss, damage, destruction or injury occasioned by said collision, but the contrary thereof appearing upon the face of said petition, the petitioner is not entitled to the relief sought in and by its said petition.

Third.—For that the facts stated in said petition show that the relief sought thereby cannot now be granted by this court.

The judge, in his decree, bearing date 26th March, 1877, denied the motion for an order restraining the prosecution of said consolidated suits; and he sustained the second and third exceptions, and ordered that the petition be and the same was thereby dismissed.

In his opinion (in p. 13 of the Record) he places his decision on the ground that the petition is too late and cannot be entertained, inasmuch as it appears, upon the face of the petition, that, prior to its being filed, the action *in rem* sought to be restrained had proceeded to a final decree.

He argues in support of this from inferred limitation from the provision in the general Admiralty rules for a trial on the merits.

II.—ASSIGNMENTS OF ERROR.

First Assignment of Error.

The judge, in denying the motion of petitioner and dismissing the petition, is in error in assuming that the decree entered in the consolidated suit referred to, which proceeded on the pleadings and proofs before the presentation of the petition, is a determination of the question of apportionment under the limited liability vested in the petitioner by the act of Congress or of the petitioner's right to such limitation, or of the question of fault for the collision.

Second Assignment of Error.

There being no such limitation in the act of Congress, as the judge supposes, to the right vested by the act of Congress in the petitioner to a limited liability, his denial of the petitioner's

motion on presenting his petition, and dismissing the petition, thereby denying and depriving the petitioner of its right, was in derogation of that act.

Third Assignment of Error.

There being no such nor any prescribed limitation of time by the act of Congress, the imputation of laches, if justly attributable, for which, in the exercise of an equitable jurisdiction, compensation might be made by requirement of payment of costs or interest, would not justify the denial of the right.

And so far as the denial of petitioner's right may go on that imputation it was error.

III.—POINTS OF ARGUMENT.

First.—As to the question of fault, the decision of the District Court in the consolidated suit was not final. It being that of a tribunal from which an appeal lies, it would not become final as a determination of that question until affirmed by the last appellate court, unless the parties acquiesced in the decision, or the time limited by law for appealing had expired.

It could have no effect as a determination of questions of apportionment under the limitation of liability by the act of Congress, or of the right to such limitation, those matters not having been before the court making the decree.

2 Best on Evidence, sec. 589, p. 998.

Second.—The right vested in the shipowner by the act of Congress to a limitation of his liability for any loss, damage or injury by collision; or for any act, matter or thing, loss,

damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner, to the amount or value of the ship and her freight then pending is vested in him absolutely; and, irrespective of any abandonment of ship or freight, and without any limitation of time as to its enforcement short of voluntary payment or actual collection.

The third section of the Act of March 3, 1851, and section 4283 of the U. S. Revised Statutes enacts: That the liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for *any loss, damage or injury by collision*, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred *without the privity or knowledge* of such owner, *shall in no case exceed the amount or value of the interest of such owner or owners respectively*, in such ship or vessel, and her freight then pending.

By the first paragraph of section 4 of the Act of March 3, 1851, and section 4284 of U. S. Revised Statutes, it is enacted: That if any such embezzlement, loss or destruction, shall be suffered by *several freighters*, or owners of goods, wares or merchandise, or any *property* whatever, on the same voyage and the *whole value of the ship or vessel and the freight for the voyage shall not be sufficient to make compensation* to each of them, (that is, to pay all the claimants entitled in full), *they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property and the owner or owners of the ship or vessel, or any of them,* may take the appropriate proceedings in any court *for the purpose of apportioning the sum for which the* owner or owners of the ship or vessel *may be liable amongst the parties entitled thereto.*

There is a further provision in the last paragraph of section 4 of the Act of 1851, in the division in the Revised Statutes designated as section 4285, in its nature substitutional or alternative, for the case of a retention by the shipowner of the ship under the limited liability presented in the preceding provisions of the act, of which the purport is that it shall be

deemed a compliance with the requirement, on the part of the shipowner, in relation to his liability to make compensation, if retaining the ship, to the extent of the amount or value of the ship and her freight, pending at the time or for the voyage (used as synonomous), if he shall transfer his interest in such vessel and freight for the benefit of such claimant to a Trustee to be appointed by any court of competent jurisdiction, to act as such Trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

The substitutional or alternative method of clearing the ship is less advantageous to claimants for losses, who do not want the ship.

It may be more or less advantageous to the shipowner, according to the extent of the claims against the ship and owner.

The retention of the ship, especially when ample security is furnished, as in case of the *Benefactor* to stand in the ship's place, which is not wasting while the claims against her are being ascertained, is greatly for the advantage of claimants for losses.

Under the provisions of this substitutional method, in cases of collision, where it is manifest at the time of the casualty that the amount or value of the ship or vessel, and the freight for the voyage, will not be sufficient to make compensation to claimants, upon the supposition that if the owner shall elect to transfer his interest in the vessel and freight for the benefit of such claimants to a Trustee, to be appointed by any court of competent jurisdiction, to act as such Trustee for the person or persons who may prove to be legally entitled thereto, he must act promptly in making such transfer, cases which may and are constantly occurring where the shipowners by taking proceedings promptly, often in great haste, to make such transfer, is enabled, with the sanction of respectable courts, through a purchase, on a sale by the Trustee, to become the owner again of his vessel, discharged from all claims and proceedings against him as owner, at a price much less than the value, often trifling, compared with the actual value, before it is possible for a claimant entitled to ascertain the extent of his loss or to reach an approximate estimate of his due proportion of value of ship and freight, with a view

to competition by himself or with others, at the sale, to increase the fund.

This substitutional provision has been referred to in adjudicated cases in the consideration of the question whether the amount or value of the ship, to which, with the freight pending the liability of the shipowner, is limited is her value immediately before the collision, according to the English rule, or her value as left by the collision and upon the evidence of intent found in the adoption of this provision from continental codes it has been determined that the value of the ship in the limitation in the act of Congress is the value as the ship is left by the collision,

The construction of the foregoing provisions in the act of Congress framed upon English statutes is not otherwise affected by the adoption of this substitutional provision, and English cases upon the construction of the foregoing provisions in other respects are relevant.

The provisions in the 4th section of the Act of 1851 and corresponding in section 4284, above recited, enacts that when there are several claimants who may be entitled to compensation, and the whole value of the ship or vessel and her freight for the voyage, shall not be sufficient to make compensation to each of them (that is, to pay all in full), then "for that purpose"—that is, for the purpose of an apportionment, so as to determine the proportional amount of the whole value of the ship or vessel and her freight for the voyage, which each claimant shall receive in compensation for his claim—the *freighter and owners* of the property (that is, the persons having claims for losses), and the owner or owners of the ship or vessel, *or any of them*, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto.

Under this, where there are several claimants who may be entitled to compensation, and the whole value of the ship or vessel and her freight for the voyage shall not be sufficient to

make compensation to each of them (that is, to pay them all in full), no claimant is entitled to compensation for more than his due proportion of the amount or value of the ship or vessel and the freight, and he is not entitled to demand or receive that compensation until his due proportion is determined; and he is not bound to wait the action of a ship owner to determine this, but he may take the initiative himself to have an apportionment made.

If he chooses to wait, it is not with him to complain of the shipowner for not taking the proceedings for an apportionment until an apparent necessity for doing so, with a view to the benefit of limited liability.

The provisions in the Act of Congress for the apportionment is an adoption substantially of corresponding provisions in English statutes, from which the phraseology is borrowed.

7 Geo. 2, ch. 15, sec. 2 (16 Stat. at Large, 465).
26 Geo. 3, ch. 86, sec. 4 (35 Stat. at Large, 818).
See also 53 Geo. 3, ch. 159, sec. 7 (53 Stat. at Large, p. 792),

in which last authority to claimant for damages to institute suit for apportionment is withdrawn.

According to the English cases, the suit for an apportionment and for the limited liability may be taken at any time during the progress of the cause brought by the claimant of damages from collisions in the Admiralty Court and of an appeal from the court of first instance to the final decision on appeal to the Privy Council.

In Leycester *v.* Logan. 3 Kay & Johnson, 146 (Feb., 1856), a suit for an apportionment and for limited liability was sustained and injunction ordered after a definitive sentence of the Admiralty Court, notwithstanding a restriction in the word "pending," in section 514 of the Merchant Shipping Act (94 Stat. at Large, p. 599).

In this case it was held against the claim of the defendant to hold his recovery by definitive sentence in the Admiralty Court after it had become final in a suit *in rem* in that court, that as to the recovery of the damages which were from a col-

lision, his claim must be reduced to his proportion of the statutory limitation of value of ship and freight.

In General Iron Screw Collier Company *v.* Schurmans, 1 Johnson & Hemming, 180 (A. D. 1860), such a suit was sustained after the suit in admiralty for damages from a collision had been affirmed on appeal to the Privy Council.

In Norwich Co. *v.* Wright, 13 Wall, 104, after interlocutory decree in favor of libellants in the District Court of Connecticut, and a reference to a master, and a report and decree for libellants for $19,975 for a schooner, and $1,921 for her cargo, with interest, and an appeal to the Circuit Court, and a further appeal to this court, this court in its decree of affirmance, directed the suspension of proceedings thereon, until respondents, the owners of the colliding steamer, appellants in the Supreme Court, shall have had reasonable time for taking the proper proceedings in the District Court for the Eastern District of New York (where the appellant's steamer had been libelled) for apportioning the damages sustained by the various parties in the case.

This disposition of the case is decisive of the *right* to an apportionment under the statute against a party whose claim is in judgment and thereafter.

Third.—The inference of the district judge, from his view of inconvenience of the working of the admiralty rules, of a limitation not found in the statute, by which the right is vested in the ship owner, is inadmissible. And a delay in the institution of the proceedings for an apportionment, or for limited liability short of time of limitation by statute, if imputable as laches for which compensation might be ordered by payment of costs, is no ground for denial of the right.

Fourth.—In England, since the right of the claimant for damages or loss from collision to initiate proceedings for an apportionment has been withdrawn, her courts, in the apportionment, add interest to the limited sum from the date of the collision.

The *Northumbria*, Law Reports (3 A. & E.) 6.
Smith *v.* Kirby, Law Reports, 1 Q. B. Div., 131.

In the Act of Congress this right has been continued.

Fifth.— The decree of the Circuit Court should be reversed with costs, and with directions to the Circuit Court to take order for proper proceedings for apportioning the damage sustained by the various parties in the case, under the limited liability vested in the petitioner by the Act of Congress, and for decreeing to the petitioner its right to this limited liability on making compensation accordingly, with such other or further directions as to the court shall seem fit, for the protection of the interests of all the parties.

C. VAN SANTVOORD,
Counsel for Petitioner Appellant.

SUPREME COURT U.S.
FILED
NOV 8 1880
JAMES H. McKENNEY, CLERK

United States Supreme Court,

FROM THE EASTERN DISTRICT OF NEW YORK.

In the Matter

of

The Petition of THE NEW YORK & WILMINGTON STEAMSHIP COMPANY, owners of the steamship "BENEFACTOR," &c.

Statement and Points on behalf of Respondents, on Petitioner's appeal from order of Circuit Court affirming order of District Court dismissing Petition.

STATEMENT.

This proceeding was instituted in February, 1877, to limit the liability of the petitioner for the loss occasioned by the collision between the steamship "*Benefactor*" and the schooner "*Susan E. Wright.*"

The collision took place on the 26th day of February, 1875. On the 4th day of March—less than a week after the collision—the steamship was libelled by the owners of the "*Susan E. Wright*" for the loss of vessel, cargo, freight, personal effects of mas-

ter, supplies, &c., and by the seamen for the loss of their personal effects. The owners of the cargo promptly intervened for their own interests in the suit brought by the owners of the vessel, so that all parties having any claim against the steamship growing out of the collision were before the Court.

On the 22d of March, 1875, the steamship having been appraised, upon petitioner's application, at $40,000, a stipulation was given on its behalf in the two suits above mentioned for such appraised value of the vessel for the benefit of the libellants in such two suits and all persons and parties having any liens upon the said steamship by reason of such collision (page 11 of record in collision suit), and thereupon, on the 22d day of March, 1877, by the order of the District Court the steamship was discharged from all liability for losses or damages growing out of such collision (page 11 of record in collision suit).

The petitioner afterwards filed answers in the two suits above mentioned, denying any liability for the losses arising from such collision, and, in April, 1876, went to trial upon the issues thus raised in the District Court. The decision was adverse to the steamship, and, after an assessment of damages had been made and duly confirmed, and after the consolidation of the two suits upon petitioner's application, final decree was entered in the District Court on the 21st of October, 1876, whereby the steamship was held liable for the damages occasioned by the collision, the stipulators were required to pay into Court the amount of their stipulations, and a distribution of the proceeds of such stipulations was directed to be made *pro rata* among the several libellants in the suit (pages 5 and 8).

That final decree was entered on the 21st of October, 1876, and this petition was not filed until the 15th of February, 1877.

The petition states the above facts, and seeks to put in issue, upon precisely the same allegations which were contained in the answers in the previous suits, the liability of the steamship for the damages occasioned by the collision.

Notice having been given to the libellants in whose favor the decree had been entered in October, 1876, of an application under this petition for an injunction against the further prosecution of the consolidated suit, said libellants appeared for the purpose of opposing such application, and filed the exceptions to the petition which are set forth at page 8 of the printed record in this case.

The District Court, after full hearing, denied the application for an injunction, sustained the second and third exceptions, and dismissed the petition (page 9).

The opinion of the District Judge is on pp. 12-13.

The Circuit Court, upon appeal, affirmed the decision of the District Court (pages 14, 15).

POINTS.

First.—The statute in respect to the limitation of liability, and the rules of the Supreme Court made thereunder, which provide a mode of relief to the ship-owner from a portion of the burthen of responsibility imposed upon him by the common law, certainly contemplate and require prompt action on his part to avail himself of the privilege thereby granted.

The Act should, and will, be liberally construed so as to protect the rights of all parties who seasonably invoke its aid, but it is to be remembered that, while it provides a generous relief to the ship-owner, it does so at the expense of the innocent party, who receives only partial redress for the injury inflicted upon him by the fault of another; and the courts will require that its provisions shall be speedily availed of, so that it may not become an instrument of further and needless hardship to the injured party.

The fair interpretation of the Act and the Rules, and the proper protection of the injured party, require that the initiatory steps toward such a limitation shall be taken by the ship-owner promptly upon the institution of proceedings, whether *in rem* or *in personam*, for the recovery of loss or damage occasioned by the collision.

(*a.*) The Act fixes a measure of the liability of the ship-owner in the prescribed cases, and it is, of course, at the time when a proceeding is first instituted to enforce such a liability, and when the ship-owner has his day in Court thereon, that he is bound to assert any right to a limitation of the liability sought to be enforced. When he is brought into Court to answer a claim for such a loss, he is bound to set up in the mode provided by law any privilege of limitation to which he may think himself entitled. If he does not do so, he waives the privilege and cannot afterwards assert it.

(*b.*) The Rule is very explicit upon this point, and shows clearly enough the time at which the benefit of the Act must be invoked. The language is: "When any ship or vessel shall

"be *libelled*, or the owner or owners thereof "shall be *sued* * * * and he or they shall "desire to claim the benefit of limitation of lia- "bility provided for in the third and fourth "sections of the said Act above recited, the said "owners shall and may file a libel or petition, "&c." The proceeding for a limitation is to be instituted *when* the vessel is *libelled* or the owner *sued*, not, of course, at the precise instant of time, but when the claim for loss shall have been first asserted in the legal way, while the litigation thereon is in its first stage, and certainly before the injured party has been forced fully to litigate the claims asserted by him. The Rule does not give the right generally *if* the vessel shall be libelled or the owner sued, but it is given "*when* the ship or ves- "sel shall be libelled, or the owner or owners "thereof shall be sued;" and if it is to be taken advantage of at all, it must be at the time so prescribed therefor. Equally expressive language is used in Rule 57, which prescribes the District Court in which the vessel "may be *libelled to* "*answer* for any such embezzlement, loss," etc., as the Court where the petition shall be filed.

(*c.*) The provisions in respect to an appraisment and the giving of a stipulation point to proceedings to be taken upon the threshold of litigation, and not after the vessel has been discharged under a different proceeding.

When, as in the present case, the vessel is libelled, the owners have their election in respect to the course which they shall pursue to procure her discharge. They may give a bond under

the Act of 1847; they may give the usual admiralty stipulation in the appraised value of the vessel; they may, in the Eastern District of New York, give the special stipulation in the appraised value of the vessel which was given in the present case; or if they see fit to do so, they may bring the value of the vessel and the freight into Court, and procure a discharge under the Limited Liability Act. The owner has his election which course to pursue, and having exercised that election is, of course, bound by it.

(*d.*) The provisions of the Act, and of the Rules in respect to the transfer of the vessel and her pending freight to a trustee to be appointed in the proceeding for the limitation of liability, also plainly contemplate the institution of the proceeding promptly after the disaster, or upon suit being commenced for the loss occasioned thereby.

It was not the purpose of Congress in passing the Act, nor of the Court in framing the Rules, to permit the owner to lie by after the institution of proceedings for the recovery of the loss, to use the vessel as his own as long as he should see fit, parrying the injured party with the delays of the law, and when he could procure no further delay, or the vessel had ceased to be of any value, to turn over the remains of his vessel, and the amount of the freight pending at the time of the disaster, to a trustee in discharge of the libellants' claims.

If the injured party commences his suit promptly upon the occurrence of the disaster, he is entitled to as prompt a transfer of the vessel and freight to a trustee for his benefit.

Any other interpretation would be wholly inconsistent with the obvious duty and purpose of Congress and the Court carefully to protect the rights of all who have suffered.

(*e.*) Referring now to the present case, we find the steamship arrested, nearly two years before the petition to limit liability was filed, and held in custody under claims vastly exceeding the value of the vessel and the pending freight.

The owner had its election as to the course to be pursued to obtain its discharge. Instead of procuring an appraisal of vessel and freight, under Rule fifty-four, or of making a transfer thereof to a trustee, it elected to pursue a different course, to have an appraisal of the vessel only, to give a stipulation for that amount alone, and thereby to procure the discharge of its vessel.

This it elected to do rather than to subject itself to the burthens, in order to avail itself of the privileges, of the Limited Liability Act, and it is certainly concluded by its own election.

Second.—But, even if an election to procure the discharge of a vessel from custody, by giving a stipulation in the appraised value in the form adopted below, shall not be held to conclude the defendant from instituting the proceeding provided for the limitation of liability, it is certainly clear that the privilege of instituting such a proceeding cannot be held to extend beyond the time of the entry of the final decree in the suit.

When the decree is entered, the shipowner has had

his day in Court both in respect to liability and the amount of liability, and the determination of the Court thereon, as expressed in the decree, is *res judicata* between the parties. And these questions cannot be again inquired into in any new proceeding.

This, also, plainly appears by the language of the Act of Congress, and the Rules of the Supreme Court.

(*a.*) Sections 4,283 and 4,284 relate to the extent of the *liability* of the owner for the loss or damage therein referred to, and are, of course, to be invoked when the question of liability is an open one, and before it has been determined by a decree.

As well might a shipowner wait until after decree before he claimed the benefit of the *exemption* provided by Section 4,282, as wait until that time before claiming the benefit of the *limitation* under Sections 4,283 and 4,284.

These privileges must be claimed while the question of liability is open and undetermined, and before judgment of the Court thereon.

(*b.*) The language of section 4,285 is equally instructive; the transfer is to be made for the benefit of "*claimants*," and to a trustee for the person "who may *prove to be* legally entitled thereto," after which transfer all "*claims*" and "*proceedings*" shall cease. There is nothing here to include the case of parties whose rights have been already lawfully established by decree.

(*c.*) The language of the Rule above quoted: "When "any ship or vessel shall be libelled, or the owner "or owners thereof shall be sued," cannot be construed to cover the time when the libel has become merged in a decree, or the suit has terminated in a judgment.

The vessel is not "*libelled to answer*" for a loss, when it has been finally adjudged liable and condemned therefor.

When the decree has been entered, the matter has passed far beyond the situation contemplated by these provisions.

(*d.*) The provisions as to transferring the vessel to a trustee are certainly wholly inconsistent with the vessel having been already condemned by the Court in a suit arising out of the very disaster in controversy.

(*e.*) The provisions of Rule 54, as to a monition against all persons "*claiming damages*," citing them "to appear before the said Court and *make due proof* of their respective *claims*," and concerning an "order to restrain the further "prosecution of all and any suit or suits "against said owner or owners in respect to "any such *claim or claims*," and the provisions of Rule 55, as to "*proof of claims*," and exceptions to the commissioner's report, and the confirmation thereof, and a decree of distribution are wholly inapplicable to a case where the claims have been already proved, and a decree made according to the established course and practice of the Court.

(*f.*) Under Rule 56, the shipowner is given the privilege in proceedings under the limited liability Act of contesting the question of liability altogether (independently of the limitation of liability under the Act), provided he states in his petition the facts and circumstances by reason of which exemption from liability is claimed, and the persons claiming damages, who shall have

presented claims to the commissioner, are permitted to answer the petition, and contest the right of the shipowner either to an exemption or limitation; this course is sought to be pursued in the present case, and with that view the petitioner has incorporated into his petition the same allegations which were inserted in its answer in the previous suits.

But it is clear that no construction of the Act, or the Rules, which would permit the shipowner to try this issue upon his answer in the suits brought against him, and when he is defeated to turn around, and by a new proceeding, litigate over again the same issue, can have been intended by Congress or by the Court. The relief in respect to the limitation of liability must be sought at a time when the questions to be discussed have not been already adjudged against the shipowner, and this very privilege of contesting the question, whether there is any liability, shows that it was the purpose of Congress and the Court to require the shipowner promptly, and before decree, to invoke the relief provided by the Act.

(*g.*) The entry of the final decree, in the cause against the vessel, establishes a fixed and vested right in favor of the libellants to the fund decreed to be liable for their claims, subject only to the review of said decree by the Supreme Court.

(*h.*) Certainly no case is made for the interposition of the Court by this outside proceeding when it appears that by the decree in the collision cause as it stands all parties entitled to claim damages for loss by reason of the collision, are entitled to share *pro rata* in the *res*. There is no pretence that any party would have the

right to come into the limited liability proceeding who is not already in the collision suit, nor has any such party ever appeared.

Finally, then, the present case is this: the disaster occurred in February, 1875; suit was promptly commenced by all the parties injured; the shipowner, after spending two years in litigating the libellants' claims, and after having been defeated at every point, proposed to procure an injunction against any proceedings under the decree already secured, and to institute a new proceeding to compel the injured parties again to litigate the question which had already been litigated in a plenary way and determined in their favor.

This is an attempted use of the Limited Liability Act which certainly never was intended, and will not be permitted.

Third.—The Rule in reference to the time of the surrender of the vessel, which is provided for under the French law, is the same.

The French Ordonnance has even less in it to fix the limits within which the surrender, which is provided for, may be made than has our statute to fix a limit for for the application to limit liability. Yet under the French law the surrender cannot be made after adjudication.

"The surrender can always be made—as long "as the owner has not ratified the obligations "of the master, or if he has not directed a third "party to pay the liability incurred by the "master, or if the tacit renunciation of the "right of surrender is not the result of all the "acts and conduct of the owner—and as long "as the ship is at his disposal, that is, *till* "*adjudication.*"

"Adjudication, depriving him of his proper- "ty, establishes against him a real forfeiture, "which would not be saved by the abandon- "ment made to the insurers."

Des Capitaines, Maitres et Patrons, par Eloy et Guerrand, p. 722.

The principles of the Admiralty with us lead to the same result.

The bonding of the vessel in the cause is the substitution of the stipulation for the vessel, which thenceforth goes free and discharged of the previous lien on her for the damage, to enforce which lien the action is brought.

The Kalamazoo, 9 Eng. Law and Eq., 560.
The Thales, 3 Ben., 329.
Affirmed, 10 Blatch., 203.
The T. P. Leathers, Newberry, 432.

The claim of Mount *et al.* against the vessel then was transferred by the bonding from the vessel to the stipulation. The foundation of the right to surrender the vessel and freight (and the giving of the proposed stipulation is only one form of surrender of the vessel and freight) is gone, for there is no longer any right or claim as against the vessel.

And this bonding of the vessel in the suit brought against her, should of itself be held to be the very case spoken of in the French authority above quoted, where "the tacit renunciation of the right of surrender is the result of the acts and conduct of the owner." *A fortiori*, where this tacit renunciation has been followed by an adjudication which fixes the right of the libellants and makes as it were a forfeiture of the rights of the claimants.

Fourth.—The order appealed from should be affirmed with costs.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Insurance Companies, Respondents.
BEEBE, WILCOX & HOBBS,
Proctors for the other Respondents.
CHARLES H. TWEED,
F. A. WILCOX,
R. D. BENEDICT,
Advocates.

OFFICE SUPREME COURT U. S.
FILED
NOV 8 1880
JAMES H. McKENNEY, Clerk

United States Supreme Court.

IN THE MATTER

of

THE PETITION OF THE NEW YORK & WILMINGTON STEAMSHIP COMPANY, owners of the Steamship "Benefactor," &c.

Statement and Points on behalf of Respondents, on Petitioner's appeal from order dismissing petition.

STATEMENT.

This proceeding was instituted in February, 1877, to limit the liability of the petitioner for the loss occasioned by the collision between the steamship "Benefactor" and the schooner "Susan Wright."

The collision took place on the 26th day of February, 1875. On the 4th day of March—less than a week after the collision—the steamship was libelled by the owners of the "Susan Wright" for the loss of vessel, cargo, freight, personal effects of master, supplies, &c., and by the seamen for the loss of their personal effects. The owners of the cargo promptly intervened for their own interests in the suit brought by the owners of the vessel,

so that all parties having any claim against the steamship growing out of the collision were before the Court.

On the 22d of March, 1875, the steamship having been appraised, upon petitioner's application, at $40,000, a stipulation was given on its behalf in the two suits above mentioned for such appraised value of the vessel for the benefit of the libellants in such two suits and of all persons and parties having any liens upon the said steamship by reason of such collision, and, thereupon, on the 22d day of March, 1877, by the order of the District Court, the steamship was discharged from all liability for losses or damages growing out of such collision.

The petitioner afterwards filed answers in the two suits above mentioned, denying any liability for the loss arising from such collision, and, in April, 1876, went to trial upon the issues thus raised in the Court below. The decision was adverse to the steamship, and, after an assessment of damages had been made and duly confirmed, and after the consolidation of the two suits, final decree was entered in the District Court on the 21st of October, 1876, whereby the steamship was held liable for the damages occasioned by the collision, the stipulators were required to pay into court the amount of their stipulations, and a distribution of the proceeds of such stipulations was directed to be made *pro rata* among the several libellants in the suit (fols. 28–43).

The final decree was entered on the 21st of October, 1876, from which decree the libellant appealed to the Circuit Court on November 1, 1876, (fol. 190) and the cause was argued at the May (1877) term, and this petition was not filed until the 15th of February, 1877.

The petition states the above facts, and seeks to put an issue, upon precisely the same allegations which were contained in the answers in the previous suits, the liability of the steamship for the damages occasioned by the collision.

Notice having been given to the libellants in whose favor the decree had been entered in October, 1876, of an application under this petition for an injunction against the further prosecution of the consolidated suit, said libellants appeared for the purpose of opposing such application, and filed the exceptions to the petition which are set forth at folios 15-17, of the record.

The District Court, after full hearing, denied the application for an injunction, sustained the second and third exceptions, and dismissed the petition.

(See opinion, fols. 23-28.)

The Circuit Court delivered no opinion.

POINTS.

I.

In view of the opinion of the learned District Court (fols. 23-28) and arguments of associate counsel for the co-libellants to be submitted herein, any further discussion of this matter would hardly seem warranted. I content myself in calling the attention of the Court to two cases where the point here involved has been touched upon.

In the case of the Norwich Company *vs.* Wright, 13 Wal., 104, decided at the December, 1871, term of this Court, Mr. Justice Bradley, in delivering the opinion of the Court, used the following language: "The difficulty with the respondents, in this case, is that they have not taken the proper steps, in the proper Court, to enable them to avail themselves of the benefit of the act. The want of any uniform practice on the subject may, perhaps, be a sufficient excuse for not having done this."

Here it will be observed that the petitioner, in face of this implied admonishment by the Court that parties should, thereafter, be prompt in their application, and notwithstanding that the Court at that term (December, 1871) settled the practice by Rules 54-57, published in 13 Wal. (the same volume containing the report of the case) and that this collision suit against the "Benefactor" was commenced March 4th, 1875, and after an interlocutory decree had been entered (April 17, 1876), and a final decree (October 21st, 1876)—notwithstanding all this, the petitioner took no steps, under the act for limiting liability, until after appeal to the Circuit, November, 1876, very near the time the case was being reached for argument in the Circuit Court, May term, 1877. And then he asked the case to be heard anew on this proceeding, on the question of negligence when the witnesses had become separated, and when about two years had elapsed from the time of collision.

It will be noticed (see prayer of petitition fols. 8 & 9,) that the petitioner makes no application for appraisement or a transfer of the petitioner's interest in the vessel and freight to a trustee as provided in rule 54, but that he be permitted simply to give a stipulation in the sum of $41,-220.32 "*being the value of said steamship and her freight &c.*" The petition further prays for an absolute injunction restraining the libellants or their proctors from further prosecution of their suits against the steamship "Benefactor" &c., and in effect the enforcement of the stipulation which as matter of law, and as petitioner alleges (see petition fol. 3,) "was to stand in place of said steamship, her engines, &c." The petitioner further prays that he may be permitted to appeal from any decree made in said proceeding, (see fol. 9.)

It is respectfully submitted that the whole proceeding would have the effect to harass, hinder and greatly delay the respondents in the collection of their claims which have been adjudicated upon after a tedious trial in the

District Court. Some five years have now elapsed since the collision, and stipulators sometimes become insolvent. The petitioner has not and could not apply for a transfer to a trustee of the steamer and her freight or his interest therein, because the *res* does not exist in the same condition as of the time of the collision. The proceeds of her sale are not in the Registry of this Court, and all the security of the libellants (respondents) is a stipulation, the enforcement of which is asked to be stayed. Courts, we submit, do not favor, procrastinated or unnecessary litigation. The petitioner has had his day in Court, and had his election at the commencement of the suits to give the usual stipulation for value; bond, under the Act of 1847, or to avail himself of the provisions of the Act of 1851, limiting his liability by giving a stipulation required by rule 54. He elected the former practice; took the vessel and has had the use of her since. If indeed he was not bound at the time by such election, he certainly must be held to be so, after the delay of two years.

To grant such relief would clearly prejudice the injured parties, who are entitled, at the hands of the Court, to early redress of their wrongs. Some of the libellants are seamen—wards of the Admiralty—and whose rights are jealously watched.

It will not be forgotten that the act of 1851 is in derogation of both the civil and common law, and should therefore be strictly construed.

The case of Dyer *vs.* The National Steam Navigation Company, 14 Blatch., 483, also throws light on this question, where a similar point was presented on the appeal to the Circuit Court (p. 484). The relief sought was denied, the Court using the following language:

"Nor is there yet time for the respondents to insti-
"tute proceedings under the act of 1851. No sufficient
"excuse is shown as in Norwich Co. *vs.* Wright for not

"having taken such proceedings. There was more than "two years after the rules and practice were prescribed "in May, 1872, and before the final decree of the Dis- "trict Court was made, during which time the proceed- "ing might have been taken in that Court."

"The respondents * * * must, after allowing a "final decree to go against them in the District Court, "without instituting any proceeding under the act of "1851, be held to have waived all right to institute such "proceeding now."

II.

The decree below should be affirmed.

BEEBE, WILCOX & HOBBS,
Proctors for Respondents.

F. A. WILCOX,
Of Counsel.

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U. S. Supreme Court.

IN THE MATTER

of

THE PETITION OF THE NEW YORK & WILMINGTON STEAMSHIP COMPANY.

Supplemental Brief for Appellees.

After examination of the brief filed in this matter on behalf of the appellants, we add the following further suggestions.

First.—It is urged that the owners of the *Benefactor* had a "vested" right to the limitation of liability which they sought, and that the dismissal of the petition was in derogation of the act of Congress. This, we submit, is a mistake. The statute, like the Statute of Limitations or the Usury Acts, furnishes what is a defense, if properly taken advantage of, but otherwise not.

(*a.*) The act provides that the liability of shipowners "shall in no case exceed the amount or value of the interest in such owner."

But, if we consider the whole act together, we shall see that the act was not one which must in all cases carry itself into effect. On the contrary, it implied in every case an action to be taken by the shipowner. It gave him shields which would protect him in whole or in part, always provided that he took the proper steps to avail himself of them.

Thus the first section provided that no owner should be liable for loss or damage to goods on board of a vessel by reason of a fire on board. But supposing a shipowner, who was sued for the loss of goods on board his vessel, failed to put forward the defense that the loss was occasioned by a fire on board, but had put forward other defenses which the court had held insufficient, and judgment had been rendered against him, would not the court proceed to enforce the judgment, notwithstanding the Act of 1851?

Again, the 2d section provided that if the shipper of bullion, &c., did not give a note in writing of its character and value and had it entered on the bill of lading, the master and owners should not be liable for its loss in any form or manner.

But suppose the owner, being sued for the loss had failed to set up this defense, and judgment had gone against him.

Would he be heard to say that he had a vested right to be exempted from liability on that ground, and that the judgment therefore could could not be collected?

The privilege which is given under the 3d and 4th sections is of precisely the same character. It is a partial defense given to the owner (the two previous sections gave him complete defenses) which is not vested in him, but which he must avail himself of in due season, or not at all.

(*b.*) As to this partial defense, the act went further than it did in the first two sections. It specified what was only implied in the other sections, that something was *required* of the shipowner, and it provided what should be "a sufficient compliance with the requirements of the act." It would have been quite in accordance with the rules for the construction of statutes, if this court had held that, as the act has specified what was a sufficient compliance with the requirements of the act, the thing which it specified, *and nothing else* was the thing which was required of the shipowner.

But this court did not so hold. It held, that something else to be done by the shipowner besides that which was specified in the act, might be a sufficient compliance with the requirement which the act made of the shipowner, if he would avail himself of the partial protection which the act offered.

The petitioners in this case, conceding as they must, that they have not complied with the requirement which the act made in terms upon them, in order to their availing themselves of such protection, and conceding, as they must also, that they have not complied with the requirement which the rules laid upon them, say that they have a vested right to the partial protection on fulfilling some other requirement.

We submit that shipowners have a right to the partial protection in question, only on complying with the requirement of the statute or the requirement of the rules. The petitioners have complied with neither, and they have no such right.

Second.—The brief cites two English cases (Leycester *vs.* Logan and Gen. I. S. C. Co. *vs.* Schurmans) in which it was held that the owners of vessels could bring suit for the limitation of their liability after a decree of the Admiralty Court against them.

But those were both cases in the Court of Chancery, which would not entertain a bill to limit liability as long as the liability was contested. An admission in the bill of the owner's liability was indispensable.

Hill *vs.* Andus, 1 Kay & Johns., 263.

It followed, necessarily, that the time to take proceedings in Chancery to limit liability could not come until the question of liability was determined.

But under our rules the ship owner may take proceedings to limit his liability, and at the same time contest all liability. The reason for the decision in those two Chancery cases fails, and the cases are of no authority, therefore, under our different system.

Third.—The petitioners' brief seeks to treat the matter as if it were only a question of "*laches* for which compensation might be ordered by payment of costs."

(*a.*) If it were a question of laches, the petitioners have made out no case for relief. They have not shown anything to account for or excuse their delaying to file their petition.

The brief, it is true, avers that it could not be known that the amount of the damage sustained by the owners of the schooner, cargo and personal effects would exceed the value of the steamship and freight pending "before the assessments which were after trial in the District Court." But there is no such averment in the petition. And we deny the statement in the brief of counsel, and aver that it not only could

be, but was known by the petitioners from the time of the filing of the libel, that the damages were more than the value of the steamship and her freight; and that the proceedings which the petitioners took for an appraisal and bonding of the steamship had that very knowledge for their foundation.

(*b.*) But it is not a question of laches. The petitioners had two courses open to them when the libels were filed: One was to take the initiative themselves, file their petition in limitation, and either surrender the vessel or give stipulation, stay the proceedings on the libels and dispose of the collision litigation in the limited liability cause, taking the results of that mode of procedure, whatever they should prove to be. The other was to remain on the defensive, as they were, taking the advantages of that position. This latter was the one that they chose to adopt.

They cannot, having pursued this road to the end, now be entitled to go back again and travel the other.

(*c.*) In the case of the *City of Norwich*, the owners of the vessel had sought from the first to avail themselves of the shield which the statute gave them. The lower court had refused to allow it to them, holding that the statute gave them no such shield as they claimed. When the case came to this court, it held that the statute did give them that shield, and it allowed them to take proceedings to avail themselves of it then, because they had not been allowed to do so before, although they had sought to do so; and the court then made rules to mark out the course to be pursued by ship owners who desired to avail themselves of the protection of the statute—general rules, to be pursued by all.

The present petitioners, instead of pursuing that course, pursued a course of their own, and now they ask this court to make *another rule for this particular case.* Such is not the method of procedure of courts of justice.

(*d.*) The petitioners have had their day in court. They have no vested right, merely because the proceedings of that day resulted disastrously to them, to have another day.

Fourth.—There are some other suggestions which the brief of the appellants seems to call for.

(*a.*) The brief (p. 3) speaks of the stipulation being filed "in the appraised value of said steamship, to wit, the sum of $40,000, with *interest, to stand in place of said steamship.*" This is repeated on page 7 of the brief.

It might be understood, perhaps, that the words "to stand in place of the said steamship" were a part of the stipulation or of the order under which it was given. But this is not so. They are the words of the counsel only.

The stipulation had the same force and effect as any similar stipulation for value in any other cause, and no other force and effect. It had no relation at all to the present proceeding, as will be seen at once when it is considered that it was given for the value of the steamship as appraised on the 20th of March, 1875; whereas the value to be taken in proceedings for a limitation of liability would be her value nearly a month before that, viz.: at the time of the collision on February 25, 1875.

(*b.*) A statement is made on page 14 of the brief as to cases which are said to be "constantly occurring." We have only to say that not a single case of the kind mentioned has ever occurred to the knowledge of the counsel for the appellees, and we think that the appellants' counsel must have been misinformed on this point.

R. D. BENEDICT,
Counsel for Appellees.